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International Court of Justice

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FINAL PLEADING

for the

Reich Cabinet

delivered by Defense Counsel

Dr. Egon KUBUSCHOK.

The proceedings which the Prosecution proposes to conduct against the organizations are in many respects a novum. For the first time there are organizations with millions of members before the judge of a criminal court; for the first time a judgment is expected covering all of the civilian and military leaders of a State. This brings to light the importance as well as the complexity of proceedings of that kind. From this also arises the duty for the defense counsel of the individual organization to concern himself with all actual and legal problems of these proceedings in general.

The Prosecution bases its move on the hypothesis that according to general principles of law there exists a collective criminal responsibility and that in consequence a criminal condemnation of a community as such is also possible. If it attempts to justify this criterion of law by examples from penal laws of various civilized countries, it must thus be cleared up concerning this that all of the examples mentioned do not prove the criminal condemnation of the organizations as such but only the condemnation of the single individual because of his membership in an organization termed criminal. Nor could it be otherwise. Criminal responsibility can only be given for the individual only. Every criminal law proceeds from the concept of guilt, from the recognition of a criminal act as such and from the unswerving formation of will to accomplish this set of factured elements. The faculty to recognize and to form a will, and with it the concept of guilt as such is possible for a natural person only.

It is another question whether as a result of developments of our age responsibility of the organization is established for the domain in which because of its very nature it is bound to violate the interests of the State. This is the domain of irregularity, not the domain of criminality rooted in ethics. Laws were created to prevent these irregularities, to punish the organizations as such because of their responsibility in the fields experienc their pernicious influence by means which could affect the organizations as such. A spunishment under administrative law

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and a fine because of violation of State interests by an organization is practicable, and for the sake of expediency the laws of various countries have ruled on it. These proceedings based on a merely objective establishment, independent from an examination of the question of guilt which is not possible.

Using this as a starting point, we must examine what must be the significance of the declaration which the Prosecution demanded.

This will result first of all in an establishment of facts, with historical and valuable contents.

Moreover, establishing of the criminal character of the organization presents a retroactive boycott for the organization which in the meantime was legally and actually dissolved, beyond that it involves especially a proscription of all organization members. That declaration embraces them all and as its effect, using Mr. Justice JACKSON's words, the "bad" elements are segregate from the "good" elements.

Finally, and that is the most decisive and at the same time the most critical import of that declaration: By virtue of the Control Council Law (Kontrollratgesetz) No. 10 it creates a far-reaching establishment of guilt for the individual member. At this time the Control Council Law No. 10 is as yet a skeleton law, so to speak. The provision of Article II d makes membership in organizations declared criminal by the Tribunal liable to punishment. Once the Tribunal has given such a verdict, thus the former gap in the criminal provision is accordingly filled out. The name of the convicted organization then is, so to speak, admitted into the wording of the provision of the penal code. The criminal nature of the organization now vanishes as a characteristic of the elements of the fact. Therefore, there is no need for the individual perpetrator to be possessed by this characteristic of the organization. The criminal action now to be adjudicated by the Court of the Control Council Law arises from mere membership. Therefore, only the objective and subjective elements of the membership as such are subject to adjudication

by the Court. The individual member who in this trial is called to account faces a decision incidentally already made which deprives him of all other subjective and objective pleas not concerned with his membership as such. He can no longer plead that he was not informed as to the criminal goals of the organization, that he did not foster them, nor can the motives for his entry or continued membership in the organization be validated any more in connection with the question of his guilt.

The incidental establishment goes even further and affects the factual elements of Article II, figure 2c of the Control Council Law, according to which the member of the organization adjudged criminal shares also in the responsibility for all the crimes which the condemned organization is charged to have committed.

As a matter of fact, the conviction of the organization practically constitutes a conviction of the individual member who belonged to the organization. The fiction of criminal responsibility of the organization thus brings about what no system for criminal procedure heretofore in existence has recognized: the guilt of the members is abstractly disassociated from them, to be transferred in toto to the organization, with the result that establishment of the guilt of the organization obviates the requirement for complete proof of the guilt of the individual member.

Pondering these consequences and the effect of proscription which will be the unavoidable effect of the declaration for all members, the definition of "criminal character" - used by the Court for the organization because of the absence of provisions of law - can have but one result: the individual member will by force be included in the Court's argumentation; the concept of the organization can be understood merely as the sum total of individual members. This means that the proceedings now requested for the purpose of establishment must be proceedings against the individual members and cannot be handled as what is abstractly termed an organization.

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From this recognition arises the difficulty of the present proceedings which, according to statements made by the Prosecution, are expected to facilitate the subsequent proceedings technically; but according to the generally adopted viewpoint for individual guilt of the perpetrator this merely means shifting of the deciding principles to a different Court. Nevertheless, that Court enjoys the advantage that because of its connection with the proceedings against the 21 main defendants it will find it easier to get a complete picture of the actual basic questions. To shift basic decisions to a Court which of necessity must take a global view of all the historical events is in itself a wholesome thought. One should not fail however, to recognize the limits set for what is practically possible. If the Court had merely been given the task of determining historical events and of judging whether a group of members of the indicted organizations participated in them, this task could be solved with comparative ease. In this case, however, the Court is given the task of making a statement on the total aims and effect of an organization, a declaration which in the light of the foregoing must take into consideration the knowledge, will and action of each individual member of the organization. From this arises the difficulty for finding a basis for a judgment which answers the wording of the proposed motion.

Another general legal viewpoint cannot be omitted in order to arrive at the definition of the concept of "criminal organization.

With its pronouncement of proscription already inherent in the conviction in this trial, and by reason of the decisions incidentally made - which is to be valid for the subsequent proceedings - the member of the organization is/Membership embraced. is the thing for which he is outlawed and for which he is to be punished. The law which establishes criminality retroactively, arising from membership in the organizations under discussion is undoubtedly a new law. The legal aspect of the retroactive law

has already been dealt with in the trial against the 21 individual defendants. The Prosecution then declared that in the application of a retroactive law there is justification for comprising actions of which the pertrator at the time of committing them knew that they constitute an infraction of the general moral and ethical standards or the world order. However, the case is different when it comes to indictmentsof the organizations. The judgement is now concerned not with the fact that an individual perpetrator committed a criminal act regardless of his awareness of its general condemnation although at the time of commission a law against it did not exist, but the point now to be decided is whether a person incriminates himself by reason of membership in an organization. Assuming that the organization in question actually had and carried out aims which were contrary to the general law of ethics or to world order, this does not of itself establish for the member of the organization the recognition of guilt through becoming a member or continuing to be a member. An organization can be criminal; its activities can be criminal and nevertheless the individual member who joins or remains - even though he may have knowledge of it - needs not under all circumstances take upon himself the burden of guilt resting upon those who set the criminal goals and who were active in carrying them out. This becomes particularly evident in the case of an organization whose purpose was originally legal and subsequently established for itself and pursued a goal partly or entirely illegal. A member which then continues to remain may do so because of a variety of motives, not necessarily immoral. It is quite conceivable that such a member resolves to remain in the organization because he believes that in so doing he may be able to influence the execution of the illegal goals, either in the hope of preventing them totally or partly, or at least to attenuate them. As regards the criminality with which he is charged, such a member is not aware of a criminal or even a moral wrong arising from the mere fact of membership in the organization

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He can judge his membership in the organization merely in the light of the law which was in force at the time his action was committed.

This can only be the law of his own country. A member can be incriminated only on the basis of what the laws and legislation of his country have established in terms of criminal responsibility arising from membership in organizations. I therefore must confine myself to discussion of that which so far formed part of the abstract knowledge of a German national about the law and verdicts in connection with that question.

Very few German penal laws have concerned themselves with criminal membership in an organization. In his speech of 28 February 1946 Mr. Justice Jackson discussed these laws. All these laws always govern only individual trials of a member. The established opinion of German jurisprudence and adjudication of paragraphs 128 and 129 of the penal code and other similar provisions of law dealing with the question of membership provide that formal membership is not sufficient to establish the facts involved in a case of criminal law but rather a continued activity for the illegitimate purposes of the organiza The member must prove his membership through his deed, and he must consciously advance the prohibited purposes through his actions. It is not deemed sufficient that the member who has knowledge of the illegitimate aims of the organizatio outwardly displays them thus expressing outwardly his approval of the purpose endorsed by his membership but he must participate in . . carrying through its goals through his own activity in the organization. Therefore, according to German law, it is immaterial whether by outward appearances his membership can be construed that he approves of the goals of the organization and that h thus supposedly enhances the reputation of an organization before the world in any measure whatsoever. Thus it eliminates all cases where proof of the knowledge of criminal goals or even active participation by the member in the execution of these goals has not been obtained; but going further it particularly eliminates cases in which the member disapproved of the goals and did all his power to prevent execution of the goals or in any case tried to attenuate them.

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A member of an association could therefore, in case he had morally unobjectionable reasons to enter or leave an association, rely on this abstract German legal principle. A retroactive law which makes simple membership punishable can therefore in no case find its justification sought by the Prosecution in the case of individual defendants. We here have no infraction against a general legal disposition or general moral principles which makes one conscious of the illegality of one's conduct. Such an infraction is, insofar as only the reasons for entering or remaining are not morally objectionable, not established.

In order to establish the concept of "criminal organization" underlying its judgment - the Court must take into consideration the knowledge and activity of the individual members. It must be established that through his membership in the organization the member approved of its criminal purpose and actually advanced it through his own activity.

In defining criminal concept it will have to be assumed that all crimes of Paragraph 6 of the Charter concern forbidden war, that especially the crimes against humanity Paragraph 6c must be connected with the planning or execution of such a war.

In conclusion, I should therefore like to establish the following. An organization can be declared criminal only if all of the individual members conceived a common plan for an outlawed war, or if they joined in a war from which the crimes of the Charter would arise as anticipated by the planners. The individual members not only must have joined the organization with such knowledge but they also must have consciously advanced these purposes by participation.

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I do not ignore that the Tribunal faces a very difficult task on account of this legal argumentation. In my deduction I started from the Prosecution's concept that the proposed statement comprises also the question of guilt of the individual member, and that in later proceedings this member can restrict himself merely to the objections which refer to the fact of the membership itself. An absolutely necessary sequence of this concept is that the Tribunal has to restrict its decision to the number of cases of the individual members, in order to avoid that the decision issued now, contains already also the verdict of guilt of all individual members without an individual examination of the question of guilt having been carried through for each individual, and consequently to avoid also that the innocent in fact are declared accomplices indiscriminately, without having been heard. In order to avoid this the only means would be that a modified verdict would merely establish objective historic events without thereby at the same time taking a decision as to the individual member and his subjective guilt. It is clear to me that such a modification would face legal scruples with regard to the law of the Control Commission. We can approve of such a solution only if the Court can eliminate these scruples and actually secure thereby that in later proceedings the case of the individual member is examined to the extent mentioned.

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If one starts from the presumption that the organization finally represents the bulk of the individual members, it leads to the conclusion that the shaping of its purposespresupposes a general training of the will of all members. Without the totality of the members, a change in the purpose of an existing organization cannot be realised. All member must at least know the new aim and must be determined to sponsor it. Should otherwise, this new aim be a criminal one, the previous lega organization would be split into two, one with "legal tendency"and another with a criminal one. It would then be impossible for the entire organization to be a criminal one.

Furthermore the question should be examined as to whether it is suffidient for the definition of a criminal character of an organization, that a further criminal purpose is added to a hitherto legal one. Here also the previous conclusion should be considered that the definition "criminal" must comprise the total aim of the organization as a body. Should the criminal purpose be only a part of the aim and should it be sufficient for the purpose of declaring the whole of the organization a criminal one, the legal aim would be at the same time discredited by this general definition. Must not those acts then, which were committed for the purpose of the fulfilment of the legal aims be illegal ones as acts of an entirely criminal association? In respect to the case of the Reich Cabinet it seems impossible to me to declare this institution as such as indubitably criminal, if at the same time there can be no doubt that at least the legal acts were valid.

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The legislation of the Reich Cabinet since 30 January 1933, which comprises all State administrations, has still today its predominent legal force. It would be an absurdity to consider these legeslative acts as valid, if the aim of the Cabinet was an unrestricted criminal one. A voluntariness which must not only be present at the joining of the organization but particularly at the changing of the original aim, also when remaining in the organization. It must therefore be actually examined, whether the spontaneous remaining in the Cabinet was always guaranteed or whether the legal and real conditions have abolished them at least from a certain date onwards. Finally the questi should be examined as to whether there existed a permanent cohesive connection between the persons who are charged as members of the Reich Cabinet. Such a connection only would justify the consideration of any acts, the Reich Cabinet is charged with, to have been committed by the community. This problem is already evident, because the Prosecution, which also, from its own point of view, considers a cohesive collaboration of the members of the organizations that has legally obtained the right to take part in the Cabinet sessions together with the body dàsignated as Reich Cabinet, as necessary.

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As these Cabinet sessions were discontinued in the course of time, it remains to be examined whether afterwards, in their stead, the members were bound in the same way by any other tie during the performance of the activity under consideration by the Prosecution. Starting from these general considerations dealing with the organizational problem as such, and the special problem of the case of the Reich Cabinet, the result of the evidence must now be examined in order to establish whether the requirements for a sentence exist as argued.

First I wish to turn to the personal limitation of the majority of the defendants. The Prosecution starts from the right to participate in the Cabinet sessions. They thereby suppose that the criminal activity assumed by them took place within the framework of the personal connection guaranteed by the sessions. They thereby overlook, however, that a number of persons mentioned by them in appendices A and B of the Trial - Brief, were merely entitled to participate in those deliberations of the Cabinet sessions which concerned their administrative sphere. If the Prosecution obviously aims at collecting the decisions of all the participants, particularly in question of general politics, those members who had the right to attend the conferences only occasionally and in part, must, as a matter of course, be excepted from the community in question. I therefore refer to appendices A and B where the Prosecution stated the extent of their right of participation for each of the persons mentioned by them.

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From the above conclusions, I believe that Reich Commissioner GERECKE's right of participation was also restricted. Moreover, this case seems equally worthy of mention because GERECKE had already resigned in April 1933.

In this connection, those must also be mentioned who had indeed a right of participation in the Cabinet sessions but had no right of voting and were only present for information. This is the case of Chief of the Press DIETRICH and State Minister MEISSNER.

The question of the voluntary status of membership to the Reich Government cannot be answered uniformly. For the question of voluntary entry into the Government, those cases will have to be particularly considered, in which State Secretaries who previously did not belong to the circle of the persons included by the Prosecution were, through the resignation of their superior Ministers, immediately charged with the conduct of ministerial affairs and thus entitled to participation in the Cabinet sessions. These have to a certain extent become organized in their official career in their new posts.

The question of a member's permanence in the Cabinet is for the moment to be judged differently. Legally, the following must be borne in mind in this respect. According to Article 11 of the Reich Minister Act of 27 March 1930, the Reichsministers could request their discharge at any moment. An alteration of the legal position could already have occurred in virtue of the Ministers Allegiance Act of 17 October 1934 (Doc. No. 23). According to this, the Ministers were to swear fidelity and obedience to HIM. A breach of fidelity and obedience could be assumed from a letter of resignation

and therefore considered legally inadmissible. The question can however actually remain undecided, the legal consequence deriving from the Ministers oath is in any case expressly and legally established by the German Civil Service Act of 26 January 1937 - 2340 PS put into effect on the 1 July 1937. By this law, the Reich Minister Act of 27 March 1930 is cancelled. By its Article 161, it is now stipulated that the Reich Ministers can now be discharged by HITLER alone.

Legally, the resignation of a Cabinet member is therefore no longer possible since the 1 July 1937. It will be objected that cases nevertheless exist where Cabinet members have obtained their discharge. The cases of GERECKE, HUGENBERG PAPEN, SCHMITT and ELTZ von Ruebenach which are anterior to this time must in respect be excluded.

In the subsequent period, various Cabinet members have endeavoured to obtain their dismissal. They have mostly failed, as we have heard on many occasions in depositions of the individual defendants. Many only succeeded in being discharged from their department but were vested all over again with a new title or a new function, whereby they subsequently fall under the category of the persons implicated by the Prosecution, DARRE was relieved from his official functions and even expelled, but could not obtain his official dismissal as Minister. Schacht had for this reason been preparing to break with HITLER for a long time; that road led him ultimately to the concentration camp. State Minister POPITZ was executed as participant in the plot of 20 July 1944.

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So we see that in spite of the legal situation, there was actually no possibility of a member of the Cabinet resigning against Hitler's will.

The Prosecution itself admits that nextto the spontaneity of membership, a cohesive cooperation of the members must be established so as to consider the Reich Cabinet as an organization or group with in the meaning of the Charter. It means that this cohesion association must be guaranteed by the Cabinet meetings and the circulating procedure. I shall show by the following, that a collective cooperation of the members of the Cabinet did not exist, that moreover in its development even an absolute division of the Cabinet resulted. According to the evidence it results that three factors, which overlap, have brought about the splitting of any internal cohesion of the Cabinet. These are the three factors as follows:

1.) The carrying through of Hitler's undivided way, which increases more and more up to an absolute dictatorship.

2.) The establishment of upper and lower ranks among the Cabinet Ministers having equal rights within the Cabinet itself, through the authority to use orders of the General Plenipotentiary, Special Delegate etc.

3.) A carefully guarded secrecy, which closed to the individual Minister any view beyond his Department, and which accordingly precludes every possibility of a super-departemental coordination.

In this relation it is necessary to consider the resulting development historically and to exhibit its principles.

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One could be inclined to assume with the Reich Cabinets until 1932 a "Cabinet solidarity". At that time Cabinet meetings were continuously takir place, where all bills and also differences of opinion on questions which affected the sphere of several ministers were submitted for consideration and decision. Majority of votes decided the decision. And, nevertheless, already for the situation of practice and science of that period, a collective responsibility of Ministers was rejected. In the authoritative "Book of reference of German Constitutional Law" (Handbuch des deutschen Staatsrechts) by ANSCHUETZ and THOMA, well-known lecturer on Constitutional Law, Freiherr Marschall von BIBERSTEIN wrote in 1930 on page 529: "General principles throw a most doubtful light upon the affirmation of collective responsibility for majority decisions, as, altogether, in jurisprudence the point of responsibility can only be in regard to rational beings. A firm State practice in the sense of such an affirmation cannot be proved for the Reich; on the contrary: The competent ministers make themselves personally responsible... Above all, German political practice does not know the principle of "Cabinet solidarity" as it is acknowledged abroad, above all i England, with the consequence of a collective guarantee for all individua actions... "

This negation of a collective guarantee is valid not only for the responsibility of minister to the Reichtag, but also in the proceedings before the State Tribunal, where the ministers could be indicted and sentenced for their activity - largely patterned after the English impeachment.

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Moreover, at that time already a restriction was placed on the making of decisions by the Cabinet and thus on the free decisions of the mini. in the right of the Reich Chancellor to determine policy, for which he then bore the sole responsibi[illegible]

There were no discussions and conferences on these orders of the Reich Chancellor; they were binding for the ministers. BIBERSTEIN wrote about this in his thesis, page 528: "Otherwise, in the encroachments which ... his (the minister's) free decision endured, through the inviolability of the Chancellor's directives. Since it was his duty to conform therewith, he stood in a position similar to that of a subordinate in the hierarchy of authorities in regard to the decrees of a superior: the individual test of the compliance with duty of his conduct was thus ... taken away form him and, as far as this was in effe his sole responsibility was, whether he had acted according to orders, and not whether he had acted correctly. For that the responsibility was shifted to the one giving the orders."

This was also true of proceedings before the State Court, the German impeachment.

We therefore have to realize already for the period of a purely democrat. German form of state and practise of state that "Cabinet solidarity" did not exist, in spite of regular Cabinet meetings, and that the Ministers certainly did not work in cohesive cooperation when the Reich Chancellor in the Cabinet meeting utilized his right to determine policy

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For the period prior the establishment of the Hitler-government, it will further have to be considered that the government authority had slowly devolved upon the person of the Reich President on the basis of the application of the Law concerning Emergency Regulations (Notverordnungsr Already at that time we see the cormal factor of legislation, the Reichstag, only legislatively active to a diminishingly little extent; the decisive laws are being issued through the Law concerning Emergency Regulation of the Reich President. The ministers, therefore, are still only advisors of the Reich President. It is a symptom of this development, that the Papen Cabinet had already purposely been established by Hindenburg as a Presidial Cabinet, that this Cabinet was composed of people in whom Hindenburg confided, which the latter had appointed as special ministers (Fachminister). The position of the Reich Chancellor, therefore, was considerably raised in importance, because neither the ministers nor the Reich Chancellor had been appointed as exponents of the parties, and as the result of this confronted the parties more independently than was the case previously. The Reich Chancellor was the liaison man of the Cabinet with the Reich President. It was this position in particular which gave him a clear superiority over the other ministers.

It is in this situation that Hitler becomes Reich Chancellor. His Cabinet also, in its early stages, is again a Presidial Cabinet, which depends on the confidence of the Reich President and the latter's Law concerning Emergency Regulations. Until the decreeing of the enabling act (Ermachtigungsgesetz) of 24 March 1933, all laws were issued by way of emergency order (Notverordnung) and therefore were subject to the responsibility of the Reich President.

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The Enabling Act (Ermaechtigungsgesetz) formed the decisive factor for furthe development. The legislative powers were now transferred to the Reich Cabine

These were not directed to HITLER personally but to the Reich Cabinet. I do not claim that the Reichstag of that time already regarded HITLER as t Reich Cabinet. But doubtless the Reichtag was influenced by Emergency Decrees which constituted the government policy for a long time. Therefore this new emergency legislation of the Reichtag intended only to legalize this state for a future emergency. Thus the authorities adjusted themselves to a Reich Cabinet of such inner structure, kind and methodof work, as it was formed during the time of the President's Cabinet. Certainly the sole responsibility was not transferred to HITLER which was assumed by the Reich President when the Emergency Decree was proclaimed. But to a certain extent he filled the gap which had now opened by the elimination of the Reich President. Outwardly this became apparent inasmuch as his - (the Reich President's) - right to issue laws was transferred to him.To this was added his right as Chancellor to determine the basic guiding principles of the policy. Both factors together resulted doubtlessly in a considerable strengthening of HITLER's power position in the Cabinet over his Ministers. The seed for his later autocracy had been planted.

In the Cabinet's working method, this was not at first clearly manifest. True, a decision is no longer reached but objections by the Ministers are taken into consideration which lead, in individual cases, to the withdrawal of radical legal drafts or to their modevation. Nevertheless, the Reich Chancellor's right to set the principles of political directives is already more manifest. Hitler lays claim to this right for himself and points out the responsibility that is entrusted to him alone. More important, however, than this development within the Cabinet are the influences introduced from the outside. The Party sets to work and runs everything that the Government purposely does not take hold of. The boycott against the Jews and the destruction of the trade unions are measures taken by the Party. The ideas of the Party take hold of the masses. The latter carries out what the Party is prone to refer to with the slogan: "Revolution". The witness Gisevius has summarized this development in his book, pages 141 to 143, in these terms: " It is not individuals that rush to National Socialism, no, the masses as masses get into movement. Because nobody wants- to lag behind the events, all strive together to precede the revolutionary development by the length of half a nose. It is only from these versatile impulses, from these irrational movements of the soul of the masses that the whole political coordination can be understood which takes place in this early summer of 1933 with a sudden intensity really but still voluntarily and spontaneously, anyhow..... As masses, they create a new volition, force a new movement."

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This movement also affected the old political parties. They dissolved themselves voluntarily. Moreover, they also make the vow to HITLER that their former members will loyally collaborate with the National Socialist State; they would summon their former members to do so. The Bavarian People's Party cleared the way "for every former member of their party to collaborate in the construction of the new Germany under Adolf HITLER's direct leadership." The Catholic Party (Zentrumspartei) by its dissolution enabled its supporters to put their abilities and experience unreservedly at the disposal of the national front under the leadership of the Reich Chancellor for positive collaboration in the sense of the consolidation of our national, social, economic and cultural relations and for the collaboration on the reconstruction of a legal state order." Even the Social Democratic Party partly followed when the Provincial committee of the Social Democratic Party of Wuerttemberg suggested to the holders of mandates "to carry on their activity in a sense which leaves no doubt as to their national conviction nor of thei good will to support Germany's new political structure according to the plans of the national revolution." The attitude of the masses, similarly influenced, is reflected in the result of the Reichtag election of 12 November 1933 in which over 90% of the voters voted for the NSDAP. I am aware of the fact that the correctness of this election result are called into doubts. Whatever may have happened in regard to influencing and falsifying the election, one thing cannot have been doubtful for any objective observer of the then prevailing conditions: that the result of such manipulations can hardly have been of such importance that it could by itself have

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created an overwhelming majority. It cannot be denied that under the then prevailing circumstances the majority of the voters, hoping to bring about a change of the existing difficult situation, put their trust in the party in which they believed they already saw the partial success of its economic measures. If one considers how the concept of the party then had carried the day with the masses and that the idea of the party culminated in the personality of Adolf HITLER, that kind of voting and public opinion was the confirmation of the leadership idea in itself. The vote was a carte blanche for the supreme party leader of the Cabinet, the Reich Chancellor.

By this development HITLER's claim to power was strengthened on the one hand and, on the other hand, most of the Cabinet members did not consider themselves able to prevent such a development. These reflections may also have been influenced by the idea that they could not effectively oppose HITLER's seizure of power. One restricted oneself, therefore, fundamentally to avoid a radical development and, as far as possible, mitigate the severity resulting from the changes made externally by the State apparatus. Thus we see the legislation clear up a situation, created from without, giving it legally a more moderate orderly form. If, accordingly, one reproaches the members of the Cabinet for moderating illegal conditions and at the same time giving them a legal basis, such reproaches are to be directed to a greater extent against the men from the middle-class camp in the Cabinet. They who according to the intentions at the

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formation of the Reich Cabinet were appointed to restrict the National Socialist influence, had subsequently not opposed the disastrous development by all means. They should have warned and opposed the influenced irrational masses and finally should have resign from office under alarming protest. It is superfluous to examine the question whether the attitude of these men was politically right or not, whether they were weak men who believed perhaps that they could thus avoid hopeless resistance. From the criminal consideration of the things the only essential point of view is whether it was discernible at that time that the development was a preparation for what happened later and accused by the Charter. If, with the formation of the Cabinet the outbreak of a real revolution, a civil war was avoided, they were entitled to believe that they have thus made at least partial sacrifices to the general mood in order to avoid a dangerous reaction of the incited masses. Rationally speaking, the hope could still exist that the development would find its natural, logical end within the framework of its legal limitations. Politically, this was doubtless a wrong idea. The radical tendencies of those who later kept pushing everything to extremes were underestimated. It should, however, be considered that the very Cabinet members who came from the middle-classes, could not rid themselves of the idea that in the practical sense of a responsible leader of the State the limit of the development will be found.

Those ministers who did not agree with this course tried to halt the development with diminishing success.

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It attempts grew the more unsuccessful when the authority of the Reich President, the weight of the bourgeois conservatives and also the position of the Reichwehr ceased to form a counter-balance. HITLER understood how to use HINDENBURG for his own purposes. The burgeois conservatives did not form a closed united front anymore, large parts divided and went over to the National Socialists. The parties dissolved themselves, and their followers were now robbed of their cohesion. BLOMBERG became a follower of HITLER. The Ministers under consideration therefore did not have any support from the other side. Toward them HITLER expanded his appointment by the people and his sole responsibility toward the people. An open protest practically proved itself as impossible The publication of the Marburg speech of PAPEN was prohibited, his departure from the Cabinet as the result of this just served to make the circle of Ministers dissatisfied with the development only still smaller and thereby less influential. Every Minister who considered the question of his resignation had to count on the fact that his position would be occupied by a new man, who did not hinder, but only furthered this development. A Minister who was really solidly with his Department did not like the idea of transferring his field of work into such new hands. It is clear that those who were confronted by this question did not want to endanger that which they had achieved by hard labor hindering and correcting in their fields of work in the execution of the laws, in the personnel policy and also in other respects, and that they wanted to continue their work in this sense in the future also.

The Head-of-the-State Law (Staatsoberhauptgesetz) of 1 August 1934 is the legal summary and the final mark under the previous development. The law is a Cabinet Law. HITLER demanded the consolidation of his office with that of the Reich President. According to his declaration this conso-

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lidation was not to be the final solution, only the momentary situation was to be considered, that he personally would not recognize a new Head-of-the-State over himself, and, on the other hand, however, he could not give up his office as Reich Chancellor. He pointed out that a decisi of the people, which was to be demanded after the death of HINDENBURG, would bring the sanctioning of this measure. In this state of affairs the Cabinet did not consider itself able to oppose the demand of HITLER. The results of the public voting were clear from the very beginning. HITLER would have achieved his aim to decree the law under all circumstances, even with the refusal of the Cabinet. The Cabinet Law of 1 August 1934 therefore practically represents nothing else but a prepara law, which in any case could be achieved and was also achieved through public voting. The legal sanctioning of the dictatorship, therefore, was only a confirmation of the previous relationships of power and a consequence of the overwhelming will of the people which existed at that time.

With this law a clear situation had been established, not only power - politically but also with regard to state law. The law represents the complete accomplishment of the monocratic principle on the state sector. HITLER consolidated the right of the Reich President in his person, especially the law emergency regulations. (Notverordnungsrecht) with the rights of the Reich Chancellor, to decide the fundamental lines of policy. As Supreme Commander of the Armed Forces he finally received the strongest factor of power in the state into his hands. With this, therefore, practically every state agency became dependent on his will and had to follow his directions. The Reich Cabinet also is no exception from this. Outwardly this becomes still especially apparent through the law concerning the oath of the Reich Ministers of 16 October 1934. The new oath for the Ministers corresponds to the general oath

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of the officials and soldiers, and shows that the position of the Minister has changed to that of a top state official bound to directives

Corresponding to this legal situation, the working procedure of the Cabinet and the importance of the Cabinet Sessions also undergo a change. Insofar as foreign political decisions were concerned, HITLER announced his decisions, mostly in one long monologue on the general political situation. Later on he only informed the Cabinet of the accomplished facts. He informed the Cabinet of the occupation of the Rhineland after the troops had already entered it. In the case of fundamental domestic, political measures, for example the Nuernberg Laws, the Cabinet as such was not previously consulted. The majority of the Ministers were surprised when the law was suggested in the Reichstag Session of the Nuernberg Party Day. In the drafting of minor laws of administrative importance only the completed draft and the reasons for it were stated. In order to avoid the expression of departmental misgivings in the Cabinet Session, the drafts were previously made "ripe for the Cabinet" in accordance with a directive of HITLER, i.e. the specialist Ministers were given the opportunity in a preliminary discussion to voice their departmental misgivings to the departmental Minister responsible for the initial draft. Only after these misgivings were allayed did the draft reach the Cabinet Session. Therefore, no allowance was made for a consultation in the Cabinet Session. General, political considerations, therefore, which were affected by these drafts, were subject to the sole decision of HITLER. If, therefore, a general political question did arise, in which HITLER's point of view was not known, then the departmental discussion was postponed until his directive had been obtained.

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By this the Cabinet sessions did not only lose every political significance, b also a practical purpose. Hitler therefore convoked the Cabinet only in constant growing intervals, until finally after a last session in February 1938 which was merely destined to receive a statement by Hitler, no Cabinet sessions whatsoever were held any more.

Henceforth the Cabinet sessions were replaced exclusively by the circulation proceedings. The acting minister submitted the drafts of bills to the other members of the Cabinet to enable them to raise objections in their own fields. It stands to reason that these political basic questions and political measures which Hitler decided as he saw fit never were subject to the circulation proceedings. As is shown by the presentation of evidence, most of the ministers were informed of the important political events in no other way than any other person. In most cases they learnt of the facts afterwards by press or radio, unl occasionally something leaked through to them through secret channels prohibited for them, too. These leakages may have been more numerous in the sphere of the minister than elsewhere. These occasional information, however, could not afford a comprehensive and authenticated total picture of the actual situation. Only the few direct confidants of Hitler were really comprehensively and authentically made acquainted with the events. This granting of confidence, however, had no connection with the person's in question being invested with the office of a minister of state. The overwhelming majority of the ministers who did not belong to this closest circle.

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learned for example of the march into Austria, the setting up of a Protectorate and the starting of the individual war measures only after the measures had become effective and had been publicized.

The circulation proceedings did not represent any personal cohesion among the ministers. Even though as a rule the drafts were submitted to all ministers, - this was not always done as shown by SCHACHT's evidence this did not mean a joint elaboration by all the ministers. This was only done to enable each minister to examine whether the interests of his administrative department might be affected by the draft. The individual minister thereby was more strictly limited to his particular department. It was his only task to submit the objections of his department and to see to it that this department was not harmed nor its competence infringed. The interests of the departments are special interests and the restriction to them excludes general aims and purposes.

The form and the planned limitation of the contents of the circulation proceedings had to and were thought to avoid a close cooperation of the ministers as can be concluded from all evidence.

In the last phase of the development this intention of HITLER clearly and openly became also evident. The taking of evidence has shown that his ministers if they did not enjoy his special confidence as was true only, for a very few, were not allowed to reach him and that all efforts of the ministers to this end were in vain.

Various ministers attempted to institute Cabinet session again in order t provide thereby opportunities for expression and information. HITLER ref this with the remark that he wanted to have nothing more to do with this defeatists' club. He even forbade a personal reunion of the Ministers arranged by LAMMERS in the form of an evening beer party.

Should the prosecution assume that the assembly of the Cabinet mem held the authoritative conduct of the State in their hands and willfully directed its whole policy towards a contemplated, reprehensible war, then this is contradicted by the fact of the disintegration of the Cabinet as cohesive whole and the evolving of a single directing head in the person HITLER. But further proof that there was no functional cohesion between Ministers can be furnished by other facts. Between HITLER's directives and their execution by the departments of the individual ministers, super offices were created which, in their turn, had authority to issue directi to each individual Minister. The departmental Minister is therefore furt removed from the headquarters of the decisive authority; he is, furtherm the executive agent of two successive directive headquarters. The "Commi for the Four-Year-Plan", the "Minister-Councillor for National Defense", the "General Plenipotentiary for Labor Assignment" and similar institutio were created by HITLER himself and provided with full legislative powers by him personally. It is even possible for most of these headquarters not

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to compel the departmental Minister to issue specific administrative directives and ordinances, but what is more, they could issue these themselves and, disregarding the Ministers, have recourse directly to the latters' subordinate offices. This dismemberment was obviously brought about by HITLER intentionally. The Cabinet as an agency for the execution of his legislative commands proved too extensive, too complicated and too obstr and the position of the Minister still too independant. Therefore, he delegated legislative power to isolated or minor groups who, as men enjoy his special trust, ensure the prompt execution of his wishes. By the creation of these new subordination positions, he restricts the power of department. Due to the confusion of the manifold relations of subordina and authority, the difficulty of defining competences and authorities, HITLER's orders are the ultimate issue, the sole reliable directive. His directives subsequently became indispensalbe in most cases and the Minis are referred to them. The picture given by the Prosecution of the offic of a closed community assembled in Cabinet sessions is thus considerably altered. An entirely new State system has been put in operation, an absolute single, supreme direction in the person of HITLER, an intermedi level introduced by HITLER and subordinate only to him, in the form of t newly created institutions discussed above, led by men who were not all of the Reich Government as defined by the Prosecution, and, as executive agencies who in this organizational structure ultimately and naturally became restricted solely to their own field of work.

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Finally, as a further factor preventing the Ministers from agreeing, the prohibition of absolute secrecy decreed by HITLER has to be considered. No Minister was to know more than was absolutely necessary for him to carry out the task specially assigned to him. Even proceedings in his own department could be kept secret from the Minister. I refer to the affidavit of Harmening from which it appears that the preparations for the intended war with Russia were delegated to the State Secretary over the head of the Minister who was ordered to keep it secret from his Minister. It could not be made clearer that HITLER revealed his plans only to those to whom he entrusted their execution, independant of their position, and those whom be considered specially suitable for it.

All this which in a democratic government is considered as a general interest concerning the entire Cabinet, is here shifted to a department and considered as their exclusive task. What in itself should be an affair of the Government is simply labelled an administrative task, which is then dealt with by simple administrative instructions. This discharge is made behind partition walls of the Department over which no other Minister has the right or opportunity to peer. As a special example I refe to the treatment of concentration camps and the later so-called "final settlement of the Jewish question". By virtue of a special mandate issued by HITLER, HIMMLER handled this question as a pure administrative concern for which his department was competent. Also in this departmental affair the basic prohibition of secrecy was valid against the other Ministers

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This development must be considered as opposed to the prosecution's opinion that the entire cabinet from the very beginning had worked with HITLER in planning the illegal war and its results and had carried on its execution. Under no circumstances could one establish the necessary close and confidential collaboration of a conspiracy being in accordance with the shown development. HITLER's endeavor in every way to curtail and control the ministers' field of responsibility, his endeavor to replace the total responsibility of the cabinet by a leadership of the individual department, the establishment of super departmental control offices outside of the cabinet, his endeavor finally, to prevent also the personal contact between the ministers, coincides in no way with the thesis of the prosecution.

In fulfilment of the assignment of the defense it is yet necessary to examine the question if and when the circle of persons, circumscribed by the prosecution, can have at all have conceived the decision for the planning and execution of the Charter crimes.

Various statements by the prosecution seem to indicate that it wishes to assume this to have taken place as early as 30 January 1933, the day the Cabinet was formed. It could logically be assumed that already the purpose of the founding of the Cabinet was criminal. To this question I only need to say little and essentially refer to the statement which I made in defense of the defendant von PAPEN.

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I would like to complete the reasons mentioned therein, by adding the statement which BRUENING made in 1932 to the Minister Count SCHWERIN-KROSIGK I refer hereby to my affidavits Nos. 1 and 3. BRUENING as the then responsib Chancellor of the Reich then already admitted the impossibility, owing to the continuance of the economic and political state of crisis, to govern permanently almost exclusively with the emergency powers of the Reich Presi dent. He declared that the agitation of the National-Socialists could be usefully fought only by obliging them to take responsibility. It is interest that this responsible-minded statesman, confirmed at such an early date, that which half a year later, after the failure of all efforts to avoid this consequence, became a fact.

This political development arising from the necessity of the moment, furt the constitutionnal necessity of forming government and the unhomogeneous composition of this entity must in any case exclude a criminal intention in the formation of the government. In addition I would still like to say, that negotiations with individual members of the Cabinet have only taken place on a very small scale, that a great number of members were taken over in the new Cabinet because of their former membership to the government, only by the desire of Reich President von HINDENBURG. To admit the existence of a criminal act in the foundation of the Cabinet would be opposed to the fact that HINDENBURG who constitutionally was responsible for the formatio of the Cabinet and as a matter of fact was very active in doing so, is not mentioned in the personal statement which the prosecution has given in Appendices A and B.

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As moreover deceased members were also mentioned by name and the circle of the Cabinetmembers was not outlined according to formal constitutional law but by practical view points, I believe I can deduce from this fact that as a result the Prosecution does not consider the foundation of the Reich Cabinet on the 30 of January 1933 to be a criminal act. The Prosecution believes at last in a common planning for the commitment of Crimes according to the Charter, already before the beginning of the Cabinet's activity, and believes to be able to draw an indication of the uniform establishing of the aim at an unpermitted war from the development of the legislative activit of the Cabinet. I will now leave the discussion of this pretended evidence and consider a particularly significant moment for this question.

It is the 5 November 1937, the day of the conferences between HITLER and his War Minister, the three Supreme Commanders of the Service and the foreign Minister, whereby he solemnly set forth his future plans. I need not to enter into the problems started by the defense counsels of the defendants, whether HITLER then developed a true picture of his plans in its full extent. One thing at least one can surely take from his declarations, that he first informed only a very limited Circle of his plans. If he solemnly confesses that he reveals his most secret plans to the personalities present, and that he purposely had omitted to inform the Cabinet as such, - as it was usual in the other countries - of such far reaching decisions, it may be clear, that he had mentioned these things <u>at first</u> to this selected circle, and that he purposely avoided informing the remaining Cabinet members of his plans.

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In his consideration of the matter HITLER developed the necessity of an imminent war. He asserted that the had come to this conclusion in the course of his four years of rule and that this conclusion was the result of the experiences gained during this time that the assurance of the vitality of the nation could not be guaranteed by economic measures. Should we even be sceptical of the truthfulness of this declaration of HITLER, there, is one thing certain:This uniform plan of a criminal war by himself and a part of these Cabinet members cannot have existed since 30 January 1933, as stated by the Prosecution, considering that he now on the 5 of November 1937 announces to a number of these Cabinet members, that his resolution and with it the actual planning for the war was born in this very hour as the result of the observation of the facts during the four previous years. If HITLER hereby expressly points to the fact, that he excludes the remaining Cabinet members from this communications, its clearly results that he does not consider the Cabinet as such the appropriate circle to receive informations of this kind. It is herewith clearly proved that, at least until this date, no such common Cabinet plan existed, and could only have been created under the leadership of HITLER.

At what date after the 5 November 1937 could such a common plan have been decided on?

In the period after the 5 of November 1937 only one single Cabinet session took place, on 4 February 1938,

in which HITLER made known to those present only the personnel changes at that time without making known the reasons for them, let alone, to develop any war plans then. If the Prosecution considers the members of the Cabinet as an associated band with the right to take part at the Cabinet Meetings, it must take the stand for the subsequent period that such a band did not exist anymore. A certain substitute for the meetings of the Cabinet existed certainly in the now exclusively employed circulation proceedings. It is however to be considered here that the circulation proceedings were probably adoptable by themselves to pursue a previously existing collective purpose by separate acts in the legislation. It is however unthinkable that such common planning for such a comprehensive crime could be undertaken by this written circulation proceeding. The extended connection must consist in some way of such naturally necessary secret conclusion. In the sphere of a Cabinet Metting this would be possible. In the sphere of a documentary debate in a circulation proceeding it appears impossible.

Above all these considerations it is moreover to be established that as a result of the entire evidence such a plan for the beginning of the forbidden war was never shared with the Cabinet, let alone discussed or even commonly planned.

Now I have still to discuss the supposition of the Prosecution that legislation activity of the Cabinet was to commencent thus that they in their entirety had pursued the aim of the war of aggression. The Prosecution believes that with the legislation the aim was

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to gain for HITLER complete control and to consolidate it and prepare and carry through the war of aggression.

The prosecution is aware that neither the establishment of totalitarian control nor the individual decrees issued by the Cabinet violate the Charter. It,however, believes it is able to establish a relation between this totalitarian control or the individual decrees and the crimes of the Charter by following construction: The plan was purposely designed from the first to meet the crimes against the Charter. In order to attain this aim and to avoid an opposition against the planning the totaliarian control of Germany was necessary. For the purpose of establishing it, a number of decrees were issued by the Cabinet.

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In part the laws showed this direct aim, in part they strove to promote this aim through their terroristic and inhuman character. The prosecution proceeds from the premise that dictatorship had been the necessary presupposition for the later crimes of the Charter and that the establishment of the dictatorship itself had been a part of the plan for the crimes of the Charter. Answering this view it must be stated that it is impossible to draw conclusions from an effect as to its cause in order to prove by that conclusion that the cause by necessity had to lead to the effect. This view would be correct only if the establishment of the dictatorship could find its compelling motive in the planning of the crimes. The opinion is wrong if the establishment of the dictatorship could seem necessary for other reasons or even expedient. Such reasons existed. The call for unified power is a natural phenomenon in times of special crisess. A unified power is able to take measures fast which are necessary for the elimination of conditions constituting a crisis. Always and everywhere, therefore, there existed a tendency towards unification in such times of crisis. This is probably provided for in the constitutional law of every country. Emergency measures then shift the power from a large body, such as parliament, to a smaller circle. We had this development in Germany already at a time when we could still be regarded as a country with a democratic government. This is proved by the emergency decree law which already at Bruening's time was applied to the largest extent. At an earlier point I have already pointed out that the thought of unification was further promoted through the

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Fuehrer concept pronounced in the party. The people believed one could find the deeper cause for the economic crisis in the lack of unified leadership. It is true the German people had received the gift of purest democracy through the Weimar Constitution, but in its whole past it had not been educated to it. Lacking was the gradual, organic development towards free democrat: thinking, the education to critical judgment. Therefore, it can be explained psychologically that when the democratic republic was in great economic difficulties, the cause for it was not seen in the real given conditions, but was sought in the lack of unified leadership. Consequently, the idea of the Fuehrer principle and an exclusive direction of destiny in one hand was popular. It found its echo in the elections which in any case must be taken for a recognition of the principles of the NSDAP and thereby of the Fuehrer idea. Neither can it be doubted that a rigid concentration on/and orientation of all spheres towards the direction by a single superior authority had in some respect a favorable effect on the execution of the comprehensive economic measures which undoubtedly were indeed very daring.

This recognition alone would already furnish the justification necessary within the framework of a consideration based on criminal law, for a co-operation of the cabinet members in the development leading to the dictatorship. In any case, the absolute conclusion made by the prosecution would be excluded, namely that the aim at an aggressive war follows necessarily from the establishment of the dictatorship.

That legislation of the Reich Cabinet, too, with which the prosecution deals from the viewpoint of terroristic and suppressive

measures, it (the prosecution) sees aimed at a dictatorship established and consolidated for the purpose of an aggressive war. In doing so it considers particularly also the anti-Jewish legislation This, too, must be examined here only from the viewpoint of whether its purpose and contents can actually be regarded as aimed at an aggressive war. The prosecution pointed out that Himmler stated in his Posen speech in 1942 he was happy to see the possibility of an internal danger through the Jews eliminated in this advanced phase of the war.

Such a statement can, if considered superficially, give cause to draw the conclusion that now actually all legislative and administrative measures against the Jews taken to a gradually increasing extent, were directed to this end welcomed by Himmler. Here, however one will have to differentiate between what was imposed by means of legislation upon the Jews in the way of restrictions and what was carried out by Himmler's administration in the way of measures of quartering them in barracks and extermination. Only the latter measures, the removal of Jews from the physical association with the other population, their absolute confinement in Polish ghettos and concentration camps and finally their physical annihilation were what Himmler could consider making the conduct of the war easier. On the other hand, although the laws issued by the Reich Cabinet, also the Nuernberg laws passed by the Reichstag, undoubtedly constitute absolute measures of suppression, however, none of these laws provides for the hermetical separation

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of the Jews from any association with the rest of the population. The laws finally lead to an exclusion of the Jews from public positions and the indu to a personal restriction of their freedom which violated even the most elementary rights of the human individual. It can be recognized that their effects were aimed at rendering life for the Jews in Germany difficult in every respect. Parallel to this runs the generally propagated goal of getting Jews to emigrate.

I believe it is the latter viewpoint which shows that the persecution of the Jews in so far as it was carried out through legislation, did not have a aggressive war as its goal, not even indirectly through the consolidated dictatorship. One cannot set aggressive war as one's goal on the one hand and on the other hand create by legislative measures a situation which of necessity drives to emigration the people robbed of the foundation for thei existence. Should one want aggressive war, it would be more than folly to expel members from one's own body of people, thereby making them enemies and driving them into foreign countries, into countries which one must consider as the future enemies within the framework of war planning. Therefrre, I believe that the entire anti-Jewish legislation can be eliminated as the consideration necessary here is limited to the crimes mentioned in the Charter. In order to complete above statements I would like to add only that a great part of these laws was not passed as one may think in full agreement of all cabinet members but the laws clearly show the signs of compromise, too, at which a part of the ministers knew how to moderate the total tendency of the law

and to limit its effect, as I have already pointed out during the defense of the defendant von Papen. From the fact that a minister participated in such legislation it does not result that he agreed with the tendency of the law and approved it. In this connection I would like to refer to the statements made during cross-examinatio by the witness Schlegelberger concerning the letter addressed by t latter to Lammers. Schlegelberger states that some party agency, probably the Race Office of the SS, intended to remove all partly Jewish persons to the east. In this instance the Ministry of Just had the possibility of stating its point of view on the occasion of a divorce question. His initial standpoint outlined in the let addressed to Lammers, which merely consisted in a rejection of th contemplated measure remained without a result. Thus, he felt obliged to moderate the measure by some practical proposal. That is the reason for his proposal, which takes up the prevention of raising mixed generations as desired by the Race Office and which contemplates to exempt all those mixed persons from whom no furth offspring can be expected any more. In this connection, he also proposes that a mixed person be exempted from being sent to the East if he agrees to be sterilized. In considering such a propose it is difficult to disregard human sentiments, and to approach its judgment with an objectivity required for a trial. But, in th instance, one can only come to the conclusion that an attempt was made here, however barbaric, to avoid measures which would have been worse and would surely have to be expected. It is certainly a problem, to determine how

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far somebody may participate in an evil in order to prevent a still greater evil. In any case the motives must be considered here, too. For the questions to be discussed in this present case, it is decisive that also the Schlegelberger proposal wished to avoid at least the geographic elimination of the mixed persons from the Germa population. In consideration of the points of view expressed by Himmler in his speech made in Posen, this alone is determining in the frame-work of contemplation of the war of aggression.

If I turn now to the further legislation, I do not have to consider it as far as it lies before June 1934. I refer here to my statements made in the Papen case.

The law of 3 July 1934, by which the measures of June 30th were justified, is considered by the prosecution as the first obvious law of injustice, by which crimes were subsequently sanctione Here also one must first depart from the point that the measures of 30 June 1934 were in no relation with the planning of a war of aggression. What Roehm planned himself and to what extent he stood in relation with some Reichswehr agencies cannot be determined. In any case, the elimination of a man like Roehm and his followers cannot be considered as the elimination of a difficulty in the plans of a war of aggression. If, beyond this, also other Hitler opponents were killed, who certainly stood in no relation to Roehm, it is without doubt plain murder, but here, too, especially when considering the personalities concerned, one cannot see any connection to a war of aggression.

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The law itself, according to its contents, exempts from punishment only those who acted "in defeating aims of high treason and treason". Thus, the law does not cover those cases which concern persons outside of the "Roehm circle". Those were partly sentenced, and partly Hitler decreed their exemption from punishment by virtue of his right of abolition. In this connection I refer to the affidavits of Meissner and Schwerin-Krosigk, as well as to the statements of witness Schlegelberger. Most of the ministers knew that tensions existed between Hitler and Roehm. The events themselves surprised them. The statements concerning the events which Hitler made at the cabinet session of 3 July 1934 were essentially the same as his declarations made at the Reichstag session of 13 July 1934. On the basis of his description the ministers were mostly of the opinion, that it was actually a question of enterprises of high treason and that the immediate defensive measures taken by Hitler were necessary in order to prevent a greater expansion of the revolt. Hitler admitted himself that excesses had occurred to a certain extent and that persons were involved who had nothing to do with the revolt. For those cases he promised a legal inquiry.

If the law, in its wording, actually limited itself to the persons who participated in the revolt, then the ministers thought that they could answer for this law. One may have objections against this law, but one must not disregard the fact that the crushing of this revolt could appear as an event

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with which a state of constant disorder and acts of violence by the Roehm followers were done away with once and for all. Therefore, one cannot draw the conclusion from this law that thereby generally also in the future, measures which were not justified by formal law, would be sanctioned afterwards and removed from the regular administration of justice. It seems possible that one advocates the view of wishing to do away legally and once and for all with such a complex of unrest, particularly if the guilt in the cases dealt with by law appeared to be evident. In any case, many believed at that time they could see in such a legal treatment of the case that the principle of the obligation to prosecute also political crimes was maintained.

Those laws have especially been singled out by the prosecution which are connected with the rearmament and alone for this reason are alleged to point to the plan of an aggressive war. In this connection the prosecution deals with the formation of a Reich Defense Council in April 1933 and the two secret Reich defense laws of 1933 and 1938.

In his testimony on the witness stand the defendant Keitel stated that as early as 1929 an interministerial working commission had been formed dealing with questions of Reich defense. This commission was not in the least concerned with operative or strategic questions or with questions of armament or procurement of war materiel. On the contrary, it deliberated exclusively the measures which had to be taken in the civil sector if the Reich should be drawn into a conflict of war.

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Into this category came especially preparations for evacuation in case of war, an indubitably defensive measure.

There was no change in the technical work of the Commission when in April 1933 every Minister was obliged to send a specialist to the Commission, instead of the voluntary collaboration of individual specialists. It was only for this reason that the Ministers grouped together to form the Reich Defense Council. In this capacity a group never worked or had discussions, but rather, the work was done in the same manner as up to now by the Reich Defense Commission. A comprehensive view of the work it did, can be found in the "Mobilization Book for Civilian Authorities", published in 1939, which contained a list of administrative measures to be taken by the civil authorities in case of a mobilization. The contents of the book in no way shows an aggressive tendency. The preparations that were made were obviously state security measures for the event of war. One cannott draw the conclusion that a war of aggression was being planned just because the work of the Commission was kept secret. It is only natural and a generally accepted fact that all measures even those for the defense of a country are not revealed to the public.

The work of the Reich Defense Commission went on continuously until the beginning of the war. It was not changed either when the unpublished Reich Defense decree of the 21. May 1935 finally gave a legal basis to the Reich Defense Council, which had been founded in April 1933 through a closed cabinet decision.

This Reich Defense Council did not meet a single time, as the interrogation of Goering, Lammers, Schacht, Keitel and Neurath has shown. There was not a single conference, and the procedure of circulating questionnaires to consult members was also not used. The only activity consisted in the task of the Reich Defense Commission, which has already been discussed here. The Reich Defense Council itself was merely the head organization for the Commission.

Through the Reich Defense Law of 21.5.1935, the position of the Plenipotentiary for the War Economy was also created. He was given the right to secure economic sources for the event of a war already in times of peace, and to give directions in this field. Actually, Schacht as Plenipotentiary for the War Economy did not issue any measures in this, his appointed official position. In practice, these tasks went over to the Commissioner for the Four-Year-Plan in 1936 already. Here again it has to be pointed out, that organizational and precautionary measures for the event of a war are a matter of course. They alone can by no means be considered proof for aggressive intentions. To take economic measures for the event of a war was an absolute necessity for Germany, due to its especially exposed economic and geographic positio in the event of a war. One could not afford to make the organizational preparations after the outbreak of a war, since an uncontrolled German industry from the start would not have been able to survive in case of war.

In answer to the idea of a purely defensive preparation

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the prosecution stated that defensive measures were uncalled for because no country had the intention of attacking Germany. In opposition to this it must be pointed out that the leadership of a country has the responsibility of taking precautions in vital points in view of even the most remote possibilities. There is never a period, in which within a reasonable space of time a country can completely exclude the possibility of war brought on from the outside.

As changes were created in the leadership of the Armed Forces through Hitler's decree of 4 February 1938, it was not noticeable at first, as the Reich Defense Council did not meet at all, that its personal composition according to the Reich Defense Law of 1935, no longer agreed with this decree. Only when Keitel as Chief of the Council pointed out these discrepancies, were they removed through the new Reich Defense Law of 4 September 1938 and at the same time - as people were generous in the Nazi regime as regards organizational matters and as they loved exaggeration and artificial distension - a huge organization was created. The Reich Defense Council was remodelled, the Commission was changed somewhat as regards its personnel. A "Plenipotentiary for the Administration" was created as well as the "Plenipotentiary for War Economy". Both together with the Chief of the OKW formed a staff of three; and most of the other ministers were subordinated to them in separate groups. The entire body, however, with the exception of the Commission, was to go into action only after the outbreak of a war, when the extensive legislative powers of the staff of three were also to become effective.

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When the war actually broke out, Hitler did not concern himself with these preparations on paper, but created the "Council of Ministers for Reich Defense" which thereby virtually replaced the current organizations. Only later, when the legislative machine of the Council of Ministers was too slow, the authorities of the staff of three appeared again, and decrees were based on their decisions. Even if it was the duty of this staff of three, just as it is the general duty of every department, to have ready those measures in its own particular field which are necessary in a purely defensive sense, still one cannot infer from this any aggressive intentions, or even the consciousness of an approaching war. Such general war preparations originate in the constant and inevitable supposition of the possibility of war. There is no indication in them of aggressive intentions If one did re ard them as such, then every country would have to be regarded as planning an agression, since no state can omit such preparations. The staff of three did not hold any discussions until the outbreak of the war, and could therefore neither have worked towards a war nor made any plans for a war of aggressions. The same is true for the Reich Defense Council. It did certainly meet twice but just how unim ortant these meetings were, particularly how little suited they were especially to the making of the most secret plans is shown by the fact that of the 12 members of the Council only a part appeared, whereas there was a very large number of counsellors from the individual departments. The large group of persons who attended -- once about 40 and an other time as many as 70 - could not have allowed a subject to come up, which needed handling in such a discreet way.

In reality the entire action of these two meetings was limited to the partial announcement by the defendant Goering of the contents of the non-published Reich Defense Law. Otherwise there were no meetings or written discussions by the members of the council.

Therefore,in summing up it can only be said, that an organizat ion was actually created here for the event of war; but that in practice it never worked. If the goal of this organization actuall had been the preparation of a war of aggression, then the great number of tasks which in this case had to be undertaken more or le in view of time, would have necessitated the actual work of the organization already in time of peace.

The "Law concerning the Rebuilding of the Wehrmacht" of 16 Ma 1935 and the "Compulsory Service Law of 21 May 1935" have also bee brought into the discussion by the prosecution. I do not wish to discuss at this point whether these laws constitute a violation of the Versailles peace treaty or not, since the only thing that is relevant for the judgement is whether the fact of the issue of the laws can be considered as a proof of plans of aggression. Already the necessary publication of the entire contents of these laws sho that they were not the basis for such a plan. The limitation to a comparatively small number of divisions in the law of 16 March 193 already makes it impossible to think of a war of aggression.

The introduction of the General Service Law also is no indication of plans of aggression.

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Compulsory defense service was introduced in most countries and no doubt on ideological grounds apart from the intention to increase the armed forces' reserves.

To form an opinion of these laws which concerned the militar organization, it must be considered that the introduction of compulsory military service in March 1935 made a new set-up of t military organization necessary. In previous years practically nothing had been planned in this field. It was not surprising, therefore, that a decree was now issued containing the principle required. This complete and compulsory reshaping an organization necessitated the laws mentioned, without providing any reasons t conclude that a war was being planned.

As regards the question of whether all the Cabinet members wer informed of the situation there need be no discussion as to whet at the outbreak of war German war preparations were actually ready fo an attack. The legal basis-for only to this extent had the major of Cabinet members to deal within their departments with questio of rearmament -could give no comprehensive insight into the actu extent of rearmament. They were restricted to whatever informati was furnished them. The generals themselves were of the opinion that given the extent of the rearmament it could only have a defensive nature. Hitler himself told them nothing of any aim at an aggressive war.

Finally, mention must be made of the law of 13 March 1938 by which Austria's Anschluss to Germany was announced. This law was not agreed upon by the entirety of the Cabinet members. Previous the

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ministers received no information of any kind as to the march of events. They merely received word in the usual way about the fact of the entry.

As regards the other laws brought up by the Prosecution, the idea that they have any connection with the planning of a war of aggression, is, in my opinion, so far-fetched that I need not go into them in detail. There are factual reasons for the creation of these laws which cannot be denied. They are included in the official grounds for the drafts of the bills, as shown in my Document Book. These grounds were added to the drafts of the bills for ministers as regards the meaning and purpose of the laws. These laws were, by the way, decreed at a later date, after which, as I have explained above, there was no longer any cohesion between Cabinet members.

The latter point of view applies in particular to the laws which were issued during the war and which have not been mentioned in detail in the indictment, either. For this period we can no longer consider a collective functioning of the Cabinet. At that time, the complete organizational reshaping of the legislative already showed itself if only outwardly in the fact that the essential laws had been issued by the newly created offices which were endowed with full legislative powers and set up for the different spheres of activity. Stress was laid on the Fuehrer decrees and the Fuehrer orders, especially as regards all fundamental and general political questions. This excluded, to begin with, all other functions but the purely departmental, subordinate work of the minis

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The conception of the unity of Cabinet members making their own free decisions and cooperating together had become a phantom long ago. Consequently, the respon bility for each individual law can be charged only to the individual or to those ministers who participated in making them, but not to the Cabinet.

The prosecution sees the aim of the crimes of the Charter as revealed in the activity of the Reich-Cabinet especially emphasized by the fact, that a close connection existed between the highest Reich offices and the party. Indivi ual ministers are said to have held the highest party offices. The "Law to Ensur Unity of Party and State" was to secure cooperation between the party and state offices. By this infiltration of the party into government leadership, party idea became practically the substance of government leadership.

In reality, neither the "Law to Ensure Unity between Party and State" nor later decrees could secure full cooperation of the government with the party. It was here that the difference between the opinions of the ministers and the leading party offices became most obvious. The ministers looked on their tasks in the administration as mere matters of state. The party had to struggle constantly, supported by Hitler's decrees, to obtain increasing cooperation in the affairs of the state offices. The witness Schlegelberger has given a clear account of this. He declared that a considerable part of the working expenditure in government agencies, especially in the Ministry of Justice of which he himself was the head, was used in order to keep off the repeated attempts of the part office to make their influence felt. We saw Fuehrer-

decrees which were supposed to accomplish this until the very end of the war, a sign that the party never fully succeeded in its intended penetration into government administration. It is, the more, not possible to follow the prosecution in its claim that owing to its penetration by the party the state apparatus was practically an instrument of the party.

In summing up I, therefore, come to the conclusion that the trial has in no way proved that collectively the members of the groups included in the indictment ever desired a war of aggression and its criminal consequences as stated in the Charter regulations, or that they even set it up as their goal and directed all their activities towards it. Anyway, as long as one can speak at all of a certain cohesion in the Cabinet, - until 1934, - the true realization of this aim may not have been clear even to Hitler. Inasmuch as he himself reckoned perhaps with this possibility and took account of it in his decisions, nevertheless, all the circumstances show that the group of people indicted here were the least suitable to be informed of such plans or even possibilities. If on 5 November 1937 Hitler did not consider the Cabinet worthy of receiving his first pronouncement as to his purposes, when he further divided up his Cabinet to a much greater extent, and even went so far in his secrecy that he withheld preparations for a war which concerned a certain department, from the minister himself, as in the case of Darre, divulging them only to a competent expert official, from all this we can only see quite plainly that collectively the Cabinet neither had knowledge of the aim which is affirmed nor could have directed their activities towards it.

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Were the thesis of the prosecution correct, Hitler would have left the existing organization as it was and would not have undertaken a complete reorganization of those in the key positions. His allegedly loyal and conspiring followers would best have been suited for the actual execution of the general plan when it had been drawn up. With regard to people in the cabinet it also seems an absurdity to imagine so close and intimate a collaboration between its members and Hitler. Here were men from the most widely-separated camps. The ministers of the individual departments, who were partly taken over by Hitler and in part newly assigned were by no means his party members. And even before, the great majority of them had no close connection with him. It is impossible to explain psychologically how and when Hitler won over these people not only to share his party ideas for their common purpose but also to commit the capital crimes of the Charter. And we see a constant change in the personnel of the Cabinet. People like Hugenberg, Papen, Schmidt, Eltz von Ruebenach & Schacht leave the Cabinet. All of them have differences with Hitler, based partly on far less weighty grounds than are represented in the crimes of the Charter. But according to the indictment all these people at the very start of their activities as Ministers are said to have blindly acquiesced in the criminal plot. To mention only the case of Eltz von Ruebenach which has been brought up by the prosecution, does it seem feasible that on accepting the golden insignia of the party a man should express his religious scruples against Nazi ideas, when on the other hand he was already

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connected with such criminal aims and had been active in them for many years. Is it not clear from his very letter to Hitler that he had no doubts as to t integrity of the Cabinet's work? How could a man like Minister Popitz be connected with such aims and their attainment when/as a conspirator on 27 July 1944 he sealed with his death his active opposition ?

The circle, of persons contained in the indictment under the conception of "Reich Cabinet" is small. And just this very thing gives us a clear example of how dangerous it is to conform to the explanation/proposed in judging the character of a community of persons and at the same time the character of an individual.

The indictment is particularly directed against the Privy Cabinet Council and the Ministerial Council for Reich Defense. I need say little about the Privy Cabinet Council. It never met and so never took any decisions or showed any activity. It was founded for personal reasons connected with the departure of the Foreign Minister von Neurath. In this Cabinet Council which was merely enacted by law, but which in practice was never active no plans could have been made nor anything done towards their execution. The Ministerial Council for the Reich Defense had been founded by a decree of Hitler at the start of the war. It is incomprehensible to me personally on what grounds the prosecution places the Council of Ministers under a separate indictment, as a separate institution within the framework of the Reich Cabinet. All its members belong to the Cabinet and up to

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Lammers they are all present in the dock. In no case could there be any practical value for the declaration made with regard to the number of people accused. So it seems that the prosecution itself has doubts as to the acceptance of its arguments concerning the entire Cabinet and wants to ensure the sentencing of this part of the Cabinet members, at least, as a minimum of its motion. My arguments for the Reich Cabinet are correspondingly valid for the Ministeri Council. Moreover, the prosecution has permitted the absence of arguments in whi it sees the Council's participation in the Charter crimes.

It is clear to me that the scope of this trial did not make it possible to establish, even in the small circle of Cabinet members, the intentions, acti and motives of individual members. The provision in Article 9 of the Charter is a compulsory one. It should provide a technical facilitation for the inclusi of greater quantities of persons. The case of the Reich Cabinet embraces a numerically small circle. 17 of them are present in the dock. Apart from these there are only 20 still alive. There exist sufficient factual and legal possib ilities to judge their former activities with perfect clarity both objectively and subjectively in an individual procedure, this being also necessary in view of their importance up to now in public life. To put all of them now into one category, and by the verdict to outlaw all of them, including those members who are dead, and to deprive them in subsequent proceedings of an argument which would affect an essential part of their defense - for this there are no reasons of any practical nature.

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In the case of the Reich Cabinet, practical considerations should not lead to the sacrifice of the universal principles of legality for the sake of practical requirements.

Finally, I feel obliged to express the following idea which general regards the problem of the organizations: Mr. Justice Jackson terme also considerations of expediency as being decisive for the verdic asked for by the prosecution. He believes that otherwise a great num er of participants in the crimes would not be included. The anc ymous perpetrators would perhaps remain to a certain extent in the background. He believes that one can also see a political reas for the verdict asked for in the principle that the "good ones" should be separated from the "bad ones".

I have explained in my statements that a general condemnatio of an organization would necessarily and ultimately include in the essential points a condemnation of possible innocent persons. But is this sacrifice of the absolute principle of justice really necessary and worth being advocated for considerations of politic appropriateness? Will the political goal be finally reached at all this way? The larger the circle of persons included in a verdict, the more diminishes the desired effect of degradation. If several millions of members are declared as criminals, and if one conside that the dependents and friends of these proscripts also do not re ain untouched by such a declaration, I believe that whatever i int nded by the separation of "good ones" and "bad ones" will not b reached. By such an expansion of the circle, the person who judge sees in the foreground those persons who, according to his opinio did and desired nothing wrong. The intended effect can be attaine only if the circle of affected persons is limited to an extent wh allows to recognize, even when judging critically, a just separat of really bad elements.

The possibility of separating morally and partly also actual

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a part of the population from the body of the nation is numerically limited. I ask that this also be considered if one has in view the aim of a general appeasement. I

I also do not believe that the verdict asked for is necessary in order to lea to their punishment perpetrators who hitherto remained anonymous. Those who c be considered as perpetrators have been for the greater part seized. Their examination in the internment camp and in the de-Nazification proceedings provides a good possibility of determining the real culprits.

Therefore, if a condemnation of all members of an organization is necessary in order to attain the endeavored goal, the transgression against the securit offered by the law which such a condemnation forcibly brings on, appears particularly objectionable.

One of the most oppressive forms of the Nazi regime we suffered in Germany was the feelin of legal insecurity. We, who had to deal professionally with these matters, we had to experience daily what it means for a legal-minded person to know that there was no legal system based on fundamentals and codes to give the individual that protection which alone makes him a free person. The feeling of insecurity, that on the grounds of some considerations of polit ical expediency, once could be seized at any hour by that system violating this primitive right of men, weighed upon every German. With the present chan of the whole situation they all want to consider this condition as finally removed once and for all times. After the experience of the past they consider that the principle of justice in particular must be without compromise. One desires to live with the conviction that only he can lose his freedom, whose criminal activity is established beyond question in a legal proceeding provid with all possible legal guarantees. Therefore, innumerable people look full expectation upon

the first tribunal which will help this principle to prevail which has been dragged in the mud for years, as an example to the world. All of us who were called to cooperate in these proceedings, found this hope strengthened in all phases of the trial. The Tribunal faces now the decision of/whether a verdict according to the motion of the prosecution shall actually include innocent people, too. Representatives of the prosecution have declared, of course, that by a cautious use of the legal possibilities the number of persons to be subsequently prosecuted could be limited to such a minimum that actually guilty people only would be reached. However, even if this intention could be carried out to the full extent in all zones of occupation, it must be considered that independent of this practice to be hoped for, the fact remains that the verdict in itself establishes the legal rule and the legal possibility for prosecuting on account of membership as such. Even if one does not agree with the legal aspect of this possibility I developed, the legal question concerning material and procedure is of such problematic nature that for the individual innocent member there is no absolute legal guarantee that he will not be prosecuted. Therefore, a situation would be finally created in which an endless number of people would live in a state of latent uncertainty and would not able to foresee whether they will ever be prosecuted and sentenced on the ground of legal possibilities. Especially, the minor cases would be affected who in any case would probably be set back by the national tribunals in the order of procedure.

In view of the vast number of members and their relatives affected by the trial of the organizations, a situation would thus be created for millions which could deprive them of what we see as our highest goal: To win back the feeling of having judicial and legal security.

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Closing Speech - Reich Cabinet (Dr. Kubuschok)

(English)

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